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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES JIM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

OPINION BELOW

The interlocutory decree and order of the district court (App. A, *infra*, pp. 14-16) and the court's findings of fact and conclusions of law (App. B, *infra*, pp. 17-28) are not reported.

JURISDICTION

This suit was brought under 28 U.S.C. 1331 and 2201 by James Jim and others as representatives of

all Indians living on the Aneth extension of the Navajo Indian Reservation in Utah to declare the Act of May 17, 1968, 82 Stat. 121, unconstitutional and to obtain an accounting by the State of Utah. The United States intervened pursuant to 28 U.S.C. 2403, in support of the Act's constitutionality. The district court's interlocutory decree and order declaring the Act unconstitutional were entered on February 17, 1972. Notice of appeal was filed by the United States on March 20, 1972 (App. C, *infra*, pp. 29-30). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 2101(a). *Fleming* v. *Rhodes*, 331 U.S. 100; *United States* v. *Raines*, 362 U.S. 17.

QUESTION PRESENTED

Whether Public Law 90-306 (82 Stat. 121) violates the Fifth Amendment in that without providing compensation for those whose interests are thereby diminished it enlarges the class of beneficiaries of a portion of the proceeds from oil and gas leases in the Aneth extension of the Navajo Indian Reservation in Utah by providing that the funds shall be used for the benefit of all Navajo Indians residing in San Juan County, Utah, rather than particularly for the benefit of the Indians residing in the Aneth extension (a portion of San Juan County), as had been provided by Public Law 403 of the 72d Congress (47 Stat. 1418).

STATUTES INVOLVED

The pertinent provisions of the 1933 Act (47 Stat. 1418) are as follows:

That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows:
* * *

[description omitted]

be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided*, That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

The pertinent provisions of the 1968 Act (82 Stat. 121) are as follows:

That section 1 of the Act of March 1, 1933 (47 Stat. 1418), is amended by deleting all of that part of the last proviso of said section 1 after the word "Utah" and inserting in lieu thereof: "for the health, education, and general

welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah, through its duly authorized officers, commissions, or agencies, to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries."

STATEMENT

In 1933, Congress added two segments of land in southern Utah (herein referred to as the Aneth extension) to the Navajo Indian Reservation. The larger segment had previously been made part of the Navajo reservation by executive orders of 1884 and 1908. In 1922, however, it was restored to its former status as public land (H. Rep. No. 1883, 72d Cong., 2d Sess.). After 1922, there was exploration for oil and gas within this area. Although no significant

oil discoveries were made, the State of Utah expressed its unwillingness to have this area restored to the Navajo Reservation unless the State would receive 37½ percent of the royalties from any oil or gas discovered on this land. After 1925, various bills were introduced in Congress to restore this land to the Navajo Reservation and to settle the question of oil and gas royalties. In a report to Congress on the matter in 1932, a special commissioner stated (S. Doc. No. 64, 72d Cong., 1st Sess., 39-40, and in general 38-44, 57-58, 77, 118):

> On January 22, 1931, H. R. 16464 was introduced by Hon. Don. B. Colton, of Utah, which again proposed that this land be restored to the Western Navajo jurisdiction. There are now a large number of Indians occupying this strip.
>
> H. R. 16464 was, we believe, unfavorably considered in committee because it contained a provision that 37½ per cent of the royalties which might be derived from oil discoveries on this land should go to the State of Utah. Since 1922, when the strip was restored to entry, there has been expended a large sum of money in prospecting for oil but no pay oil has been developed, and it is now generally believed that none will be. However, the State of Utah is unwilling to see this area restored to the reservation unless this proviso is in the bill. The matter was fully discussed at the Navajo Tribal Council held at Fort Wingate in 1931 in the presence of Commissioner Rhoads, and the Indians expressed their willingness that the proviso should be in the bill. What they want is control of the land

> for grazing and they are not much interested in the oil prospects there, especially since they are now convinced that there is no oil.

In the following year, Congress passed Public Law 403 (the 1933 Act). The Act added the Aneth extension to the Navajo Indian Reservation and gave the State of Utah the right to receive 37½ per cent of the royalties from any oil or gas produced from this land. But Congress added the proviso,

> That said 37½ per cent of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof [the Aneth extension], or for the benefit of the Indians residing therein.

The remaining 62½ percent by implication would be received by the Navajo Tribe without limitation as to its use.

Oil and gas were then discovered on the Aneth extension, and the Navajo Indian Tribe has received 62½ percent of the royalties from these leases; the other 37½ percent has gone to the State of Utah for the purposes expressed in the 1933 Act (Finding 13, App. B, *infra*, p. 22).

In 1968 (82 Stat. 121, *supra*, pp. 3-4) Congress amended the 1933 Act. The committee reports gave the following reasons for the amendment: (1) differing interpretations of the word "tuition" in the 1933 Act resulted in litigation and left the Utah Indian Affairs Commission in doubt about how broad

an educational program it could administer with the royalty funds; (2) it was difficult properly to plan for construction of roads only within the areas specified in the proviso to the 1933 Act; (3) tuition and road construction needs were met for the most part from other federal programs; and (4) many Navajo families do not live permanently within the Aneth extension, but move back and forth between this area and other locations, thus making it difficult to determine which Indians qualified as "residents" under the Act. (S. Rep. No. 710, 90th Cong., 1st Sess.; H. Rep. No. 1324, 90th Cong., 2d Sess.) Congress, with the approval of the Navajo Tribe (H. Rep. No. 1324, 90th Cong., 2d Sess., p. 5), therefore amended the Act so that royalties received by the State of Utah from oil and gas leases on the Aneth extension could be expended more generally "for the health, education, and general welfare of the Navajo Indians residing in San Juan County [Utah]" (82 Stat. 121).

In the present case the plaintiffs, as representatives of all the Indians residing on the Aneth extension, brought a class action in the district court against the State of Utah for a declaratory judgment that the 1968 Act is unconstitutional, for an accounting by the State and for other relief. The United States intervened pursuant to 28 U.S.C. 2403 in support of the constitutionality of the Act. The district court found that the class represented by plaintiffs, by virtue of the 1933 Act and prior judicial interpretation of it, were the sole beneficial owners of 37½ percent of the royalties derived from tribal

leases on the Aneth extension, and that the 1968 amendment of the 1933 Act enlarged the class of beneficiaries of these royalties from approximately 1,500 Indians residing on the Aneth extension to approximately 15,000 Navajo Indians residing in San Juan County, Utah (App. B, *infra*, p. 24). The court concluded that the legal effect of the 1933 Act had been a complete disclaimer on the part of the United States of any right, title or interest in the Aneth extension, including all minerals therein (*id.* at 26). In the interlocutory decree and order (App. A, *infra*) the court held the 1968 Act of Congress unconstitutional on the ground that it deprived the plaintiffs, and the class they represent, of their title to the 37½ percent royalties in violation of the Fifth Amendment to the Constitution (*id.* at pp. 15-16).

THE QUESTIONS ARE SUBSTANTIAL

The district court in this case has declared unconstitutional the 1968 Act adopted by Congress to make the proceeds from oil and gas leases on the Navajo Reservation of greater benefit to the Tribe by broadening the uses to which those proceeds can be put. Its decision, which we believe erroneous, is apparently based on a rationale which would deprive Congress and the Department of the Interior of the ability to make needed changes in the management of Indian lands without giving compensation to individuals never heretofore considered to have compensable property rights in tribal lands.

1. Under the 1933 Act, which made the Aneth extension a part of the Navajo Reservation, the entire Navajo Tribe has received, and continues to receive, 62½ percent of the royalties from the oil and gas leases on the Aneth extension. A compromise was reached giving the State of Utah management of the remaining 37½ percent (see *supra* p. 6), but nothing in the 1933 Act indicates the vesting of a property interest in the particular individuals who might expect to benefit from the expenditures of these funds that the Act authorized Utah to make. Under settled principles, whatever vested interests might exist in the royalties from oil and gas leases on any portion of the Navajo Reservation are vested in the Navajo Tribe,[1] not in any individual or groups of individual Indians. For the general rule with respect to reservation lands is that "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members."[2] *Cherokee Na-*

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[1] There is no need in the present case to determine whether the 1933 Act conferred any property interest in these royalties on the Tribe—a matter which depends on the language and purpose of the Act (*Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103).

[2] For similar reasons, plaintiffs' reliance in the district court on a claim of aboriginal title antedating the 1933 Act provides no apparent basis for giving them as individuals a superior claim to that of the Tribe in these lands. In any event, rights claimed only by aboriginal title, and never recognized by Congress in a statute or treaty, can be terminated and the lands disposed of by Act of Congress without

tion v. *Hitchock*, 187 U.S. 294, 307. See also *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 136. Indeed, we know of no case in which individuals or groups of individuals within a tribe have been held to possess a vested property interest in tribal land or tribal funds. And prior litigation concerning proper expenditure of the royalty funds under the 1933 Act did not raise, much less settle, any question of a property interest in the royalties on the part of residents of the Aneth extension. See *Sakezzie* v. *Utah Indian Affairs Commission*, 198 F. Supp. 218, 215 F. Supp. 12 (D. Utah).

Although the particular language and background of the two statutes involved here preclude any exact precedent, *Gritts* v. *Fisher*, 224 U.S. 640, was a similar case. The situation was the following: By an Act of Congress of 1902, lands and funds of the Cherokee Indian Tribe could be allotted and distributed among the members of the Tribe living on September 1, 1902. By an Act of Congress of 1906, Cherokee children living on March 4, 1906, were allowed to participate in the allotment and distribution. This enlargement of the number of participants by the 1906 Act diminished the share available for those provided for in the 1902 Act. Those covered by the earlier Act brought suit contending that their vested interest in the lands and funds had been impaired by

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any legal obligation to provide compensation. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279; *United States* v. *Sante Fe Pacific R. Co.*, 314 U.S. 339, 347.

the subsequent legislation. This Court rejected the contention, stating (224 U.S. at 648):

> [I]t is said that the act of 1902 contemplated that they alone [those members living on September 1, 1902] should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when it is only an act of Congress and can have no greater effect.' * * * [Citation omitted.] It was but an extension of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

Similarly in the present case, we submit, Congress had the power to enlarge the class of Indian beneficiaries of the oil and gas royalties and to broaden the purposes for which these royalties collected by the State could be spent under the 1933 Act.[3]

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[3] Compare, in another context, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, holding that a state statute lifting the bar of a statute of limitations so as to restore a lapsed action against the complainant is not a taking of his property. See also *Fletcher* v. *Felker*, 97 F. Supp. 755 (W.D. Ark.); *Opinion of the Justices*, 337 Mass. 786, 151 N.E. 2d 475; *In re Bachmann's Estate*, 151 Misc. 761, 272 N.Y.S. 467, all

2. Moreover, whatever special benefit the 1933 Act conferred on the particular Indians residing in the Aneth extension was no more than a gratuity or privilege which Congress could and did withdraw by a subsequent Act. "The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." *Lynch* v. *United States*, 292 U.S. 571, 577. See also *Cummings* v. *Deutsche Bank and Discontogesellschaft*, 300 U.S. 115, 122-124; *Maricopa County* v. *Valley National Bank of Phoenix*, 318 U.S. 357, 362. The residents of the Aneth extension in 1933 gave up nothing to receive the congressional gratuity of being the beneficiaries of 37½ percent of the royalties; nor were they interested in oil or gas discoveries since they believed in 1933 that no oil or gas existed on the Aneth extension; they only wanted this area added to the Navajo Reservation so they could continue to graze their flocks there.

It was, therefore, entirely proper and constitutional for Congress in 1968 to provide for more equitable and useful expenditure of the Reservation's oil and gas royalties on behalf of members of the Tribe.

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holding that before her husband's death a wife's right of dower is not a vested right in property precluding subsequent legislative modification or destruction without compensation. See also the cases cited in point 2, *infra*.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
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Attorneys.

MAY 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. 21-70

[Filed in United States District Court, District of Utah. Time: Feb. 17, 1972. /s/ Andrew John Brennan, Clerk.]

JAMES JIM, TOM BELETSO, SETH BIGMAN, and DAVID KING, PLAINTIFFS

vs.

STATE OF UTAH, UTAH BOARD OF INDIAN AFFAIRS, JOHN BOYDEN, LYMAN TYLER, DON E. SMITH, TINA WILLIE, HOMEY SECAKUKU, FRANK TIMBIMBOO and MCKAY PICKYVIT, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENOR

INTERLOCUTORY DECREE AND ORDER

The above case was heard by the Court sitting without a jury. In order to accommodate witnesses, some of whom were old and unable to travel, hearings were held at Ol Jato on the Navajo Indian Reservation where oral and written testimony was received. Other hearings were held at which points of law were argued by respective counsel. The last hearing was held on August 23, 1971 where all issues were argued except those hereinafter reserved for later determination. Plaintiffs, defendants and intervenor rested and submitted the matter to the Court for determination and decision.

Plaintiffs were represented at said hearings by their attorneys and the defendants were represented

by the Attorney General of the State of Utah through his Special Assistant. The United States of America was represented at all hearings after entering its special appearance by the United States District Attorney for the District of Utah. The parties were given an opportunity to submit briefs and to present argument to the Court. The Court having made its Findings of Fact and Conclusions of Law, now ORDERS, ADJUDGES AND DECREES as follows:

1. The plaintiffs and the class of Indians represented by them are the beneficial owners of 37½% of all royalties derived from tribal oil and gas leases covering lands located in the Aneth Extension of the Navajo Indian Reservation, which Extension is more particularly described in the Findings of Fact and Conclusions of Law on file herein. The title to and ownership of such royalties is a community title.

2. The state of Utah holds the title to said 37½% royalty funds as trustee as provided in Public Law No. 403 enacted by Congress of the United States, March 1, 1933 (47 Stat. 1418) (hereinafter referred to as the "1933 Act") and as determined by this Court in Sakezzie, et al. vs. The Utah State Indian Affairs Commission, et al.

3. The Act of Congress of the United States amending the 1933 Act by Public Law No. 90-306 (82 Stat. 121) dated May 17, 1968, (hereinafter referred to as the "1968 Amendment") enlarged the class of beneficiaries of said 37½% royalties from approximately 1,500 Indians residing on the Aneth Extension to include all Navajo Indians residing in San Juan County, Utah, which number approximately 15,000 and deprives the plaintiffs of their title and ownership of said 37½% royalties, in violation of Amendment V to the Constitution of the United

States and is unconstitutional and invalid insofar as it dilutes the plaintiffs' title and ownership and changes the purposes for which such royalty funds may be expended.

4. Defendants hereby are ordered and directed, within thirty (30) days from the date hereof, to file with the Court those monthly written reports decreed in Sakezzie, et al. vs. The Utah State Indian Affairs Commission, et al., for the periods from February 25, 1963 to May 17, 1968, and from May 17, 1968 to the present. Said written reports shall show the amount of the fund, new increments, administrative expenses charged against the fund, other expenditures or disbursements from the fund, including the person or persons to whom the disbursements were made and the purposes of said disbursements, commitments against the fund, whether tentative or permanent but not expended, and a description of the projects which may involve future expenditures or disbursements from said fund.

5. A final judgment and decree declaring the rights, duties and liabilities in accordance with the Findings of Fact and Conclusions of Law and the said accounting will be made and entered after review of said accounting by the Court.

6. The Court retains jurisdiction of this action until a full accounting as required herein has been made and, to make such further appropriate Findings of Fact, Conclusions of Law, Orders and Decrees as may be appropriate in the premises.

Signed this 17 day of Feb., 1972.

/s/ Willis W. Ritter
Chief Judge
United States District Court
for the District of Utah,
Central Division

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Caption Omitted in Printing]

The above case was heard by the Court sitting without a jury. In order to accommodate witnesses, some of whom were old and unable to travel, hearings were held at Ol Jato on the Navajo Indian Reservation where oral and written testimony was received. Other hearings were held at which points of law were argued by respective counsel. The last hearing was held on August 23, 1971 where all issues were argued except those hereinafter reserved for later determination. Plaintiffs, defendants and intervenor rested and submitted the matter to the Court for determination and decision.

Plaintiffs were represented at said hearings by their attorneys and the defendants were represented by the Attorney General of the State of Utah through his Special Assistant. The United States of America was represented at all hearings after entering its special appearance by the United States District Attorney for the District of Utah. The parties were given an opportunity to submit briefs and to present argument to the Court. The Court having considered the evidence, the briefs and the arguments of counsel and being fully advised in the premises, now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiffs are citizens of the State of Utah and reside on what is known as the Aneth Extension of

the Navajo Indian Reservation in San Juan County, Utah.

2. Defendants Don E. Smith, Tina Willie, Homey Secakuku, Frank L. Timbimboo and McKay Pickyvit are, and at all times material hereto have been duly qualified members of the Utah Board of Indian Affairs.

3. When the complaint was filed, defendants John Boyden and Lyman Tyler were duly qualified members of the Utah Board of Indian Affairs. Their terms on said Board have expired and they have been replaced by defendants Robert Billie and J. Clark Ballard, who have been and now are duly appointed members of said Board.

4. The Utah Board of Indian Affairs is an agency of the State of Utah charged with the administration and expenditure of the oil and gas royalties involved in this action. It is the successor of the Utah Commission of State Indian Affairs.

5. This action arises under the Constitution and laws of the United States of America, particularly Amendment V, and 47 Stat. 1418. The amount in controversy is in excess of $10,000 exclusive of interest and costs.

6. Jurisdiction to hear and determine this action is conferred by 28 U.S.C. § 1331 and 28 U.S.C. § 2201.

7. Pursuant to 28 U.S.C. § 2403 certification was given to the Attorney General of the United States that this action challenged the constitutionality of an Act of Congress. Following said notice the United States was permitted to intervene for the purposes specified in said statute.

8. The action is properly maintainable as a class action pursuant to Rule 23 (a) and 23 (b) (2), Federal Rules of Civil Procedure in that the class is

so numerous that joinder of all members is impracticable; the questions of law and fact raised are common to the class; the claims of the plaintiffs are typical of the claims of the class; the plaintiffs in their representative capacity will fairly and adequately protect the interests of the class; and the defendants have acted and refused to act on grounds generally appplicable to the class thereby making appropriate relief with respect to the class as a whole.

9. Plaintiffs are members of the class which consists of approximately 1,500 Indians residing on the Aneth Extension of the Navajo Indian Reservation.

10. The members of this class consist of those Indians who now reside on the Aneth Extension and such other Indians as the Secretary of Interior may see fit to settle thereon. The Secretary has not located other Indians on said Aneth Extension.

11. Public Law No. 403, 72nd Congress (47 Stat. 1418), enacted by the Congress of the United States and dated March 1, 1933 (hereinafter referred to as the "1933 Act") added the Aneth Extension to the Navajo Indian Reservation and created a royalty for the benefit of plaintiffs and the class they represent, with the full text of said Act providing as follows:

> That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows:
>
> > Beginning at a point where the San Juan River intersects the one hundred and tenth degree of west longitude; thence down said river to its confluence with the Colorado River; thence down the Colorado River to a point where said river crosses the boundary line between Utah and Arizona; thence east

along said boundary line to the one hundred and tenth degree of west longitude; thence north to the place of beginning; also beginning at a point where the west rim of Montezuma Creek or wash intersects the north boundary line of the Navajo Indian Reservation in Utah; thence northerly along the western rim of said creek or wash to a point where it intersects the section line running east and west between sections 23 and 25, township 39 south, range 24 east, Salt Lake base and meridian in Utah; thence eastward along said section line to the northeast section corner of section 26, township 39 south, range 25 east; thence south one mile along the section line between sections 25 and 26 to the southeast section corner of section 26, township 39 south, range 26 east; thence eastward along the section line between sections 25 and 36, township 39 south, range 25 east, extending through township 39 south, range 26 east, to its intersection with the boundary line between Utah and Colorado; thence south along said boundary line to its intersection with the north boundary line of the Navajo Indian Reservation; thence in a westerly direction along the north boundary line of said reservation to the point of beginning be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: Provided, That no further allotments of lands to Indians on

the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

Sec. 2. That the State of Utah may relinquish such tracts of school land within the areas added to the Navajo Reservation by section 1 of this Act as it may see fit in favor of the said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

12. Plaintiffs and their ancestors for generations prior to the enactment of the 1933 Act and prior to the settlement of San Juan County by those they identify as "Anglo Americans" lived in the area

known as the Aneth Extension as a definable group. During said time and until the present, they have farmed and grazed their livestock on said lands and have recognized and respected specific territorial boundaries between each other on the reserved lands and between themselves and "Anglo Americans" outside of said reservation.

13. Following the enactment of the 1933 Act, oil and gas were discovered on the lands identified in said Act. This discovery, which is known as the Aneth Oil Field, produced tribal royalties, 37½% of which have been and are now being paid to the defendant, State of Utah, in accordance with said Act.

14. The State of Utah, by legislative act, delegated to The Commission of State Indian Affairs the administration and expenditure of said royalties. Thereafter, the State of Utah, by further legislative enactment, created the defendant, Utah Board of Indian Affairs, and transferred to said Board all of the functions, powers, duties, rights, and responsibilities theretofore delegated to The Commision of State Indian Affairs. The Utah Board of Indian Affairs is now and at all times referred to herein was charged with the responsibility of the administration and expenditure of said royalties for the uses and purposes set forth in the 1933 Act.

15. Title and ownership of the 37½% oil and gas royalties derived from leases covering lands in the Aneth Extension has heretofore been determined by this Court in the following case:

> Hosteen Sakezzie and Thomas Billy, in their own behalf and as representatives of and members of the class of persons who are Navajo Indians residing within the Aneth Extension of the Nav-

ajo Indian Reservation in San Juan County, Utah, Plaintiffs,

vs.

The Utah State Indian Affairs Commission and its members, Beverly S. Clendenin, Chairman, Harold Drake and Don Smith, members of said Commission, Defendants, (Case No. C-55-61; 198 F.Supp. 218 (1961) Supplemental Proceedings 215 F.Supp. 12) (1963).

16. In the Sakezzie case, this Court concluded that plaintiffs, as members of a class, were entitled to institute the action on behalf of the Indians defined in the 1933 Act, who this Court finds are the same Indians, as a class, who are represented by plaintiffs in this proceeding. The Court in the Sakezzie case determined that the class was the sole beneficial owner of 37½% of the royalties derived from tribal leases on the Aneth Extension. No appeal was taken from the judgment and the same has become final and is res judicata between the said parties as to the right to the beneficial use and ownership of said royalties as provided in the "1933 Act."

17. In 1968, the Congress of the United States amended the 1933 Act by Public Law No. 90-306, 90th Congress (82 Stat. 121) dated May 17, 1968, (hereinafter referred to as the "1968 Amendment"), which provided as follows:

> Section 1 of the Act of March 1, 1933 (47 Stat. 1418), is amended by deleting all of that part of the last proviso of said section 1 after the word "Utah" and inserting in lieu thereof: "for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in

cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah, through its duly authorized officers, commissions, or agencies, to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries.

18. The 1968 Amendment enlarged the class of beneficiaries of said oil and gas royalties from the approximately 1,500 Indians residing on the Aneth Extension to include within the class of beneficiaries, all of the Navajo Indians residing in San Juan County, Utah, which number approximately 15,000, thereby depriving the plaintiffs, as a class, of their right to receive the benefit of said royalties.

19. The defendant, Utah Board of Indian Affairs, has been and now is using and threatens to continue using and disbursing said 37½% of said royalties for the health, education and general welfare of the approximately 15,000 Navajo Indians residing in San Juan County and has not used and is not using said royalties solely for the use and benefit of the Indians

residing on the Aneth Extension as provided in the "1933 Act" and as determined by this Court in Sakezzie, et al. vs. The Utah State Indian Affairs Commission, et al. C-55-61.

The defendant, Utah Board of Indian Affairs, for the fiscal year ending June 30, 1969 authorized the expenditure of $193,000.00 for tuition, room and board, clothing and maintenance of Navajo Indian school children attending public schools and post-high school institutions. At that time, 788 Navajo Indian children in elementary and public schools in Utah were receiving out of the said 37½% royalty fund, support or partial support and maintenance from the defendant, Utah Board of Indian Affairs; 352 of those students were residing on the Aneth Extension, but 436 were residing in San Juan County, Utah, outside the Aneth Extension. Of the 52 post-high school graduates being supported in whole or in part out of the said royalty fund at that time, 26 resided on the Aneth Extension and 26 resided in San Juan County, Utah, outside the Aneth Extension. It cannot be ascertained without a detailed accounting what amounts were expended for the benefit of those Indian students residing on the Aneth Extension and what amounts were expended for those residing outside the Aneth Extension, what other amounts, if any, were expended from said royalty fund for other purposes for the benefit of Indians residing outside the Aneth Extension and what amounts, if any, were expended from the funds accrued in said royalty fund prior to the enactment of the 1968 Amendment for the benefit of Indians residing outside the Aneth Extension.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of this action and of the person of the original defendants and of the defendants who have become such since the filing of the Amended Complaint.

2. This action is properly maintainable as a class action under Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure.

3. Neither the United States of America nor the Navajo Indian Tribe is a necessary or indispensable party to the full adjudication of this action.

4. The relief sought by plaintiffs in this action requires no action by and imposes no restraint upon either the United States of America or the Navajo Tribe.

5. The State of Utah has no immunity from this action. This action has no impact on the governmental actions of the State of Utah because the said royalty funds are not State revenues and are not disbursed to fulfill State governmental obligations and the State of Utah has by the enactment of Section 6, Chapter 139, Laws of Utah 1965, waived its immunity from suit.

6. The legal effect of the 1933 Act is a complete disclaimer on the part of the United States of any right, title, or interest in the Aneth Extension, including all minerals therein, and the only title which remained in the United States was and is merely a dry, legal title.

7. The title, ownership and/or beneficial use of 62½% of the royalties derived from tribal oil and gas leases covering parts of the Aneth Extension is not involved in this action and plaintiffs are not in this action contesting the provisions of the 1933 Act

creating a trust covering 37½% of such royalties for the benefit of the plaintiffs.

8. Plaintiffs and the class they represent are the sole beneficial owners of the said 37½% of the royalties derived from the tribal oil and gas leases on the Aneth Extension.

9. The ownership of the plaintiffs in said 37½% of the royalties derived from tribal leases on the Aneth Extension is a community title.

10. Plaintiffs are entitled to an order directing defendants within 30 days to file with the Court those monthly written reports decreed in Sakezzie, et al. vs. The Utah State Indian Affairs Commission, et al., for the periods from February 25, 1963 to May 17, 1968, and from May 17, 1968 to the present. Said written reports shall show the amount of the fund, new increments, administrative expenses charged against the fund, other expenditures or disbursements from the fund, including the person or persons to whom the disbursements were made and the purposes of said disbursements, commitments against the fund, whether tentative or permanent but not expended, and a description of the projects which may involve future expenditures or disbursements from said fund.

11. Plaintiffs are entitled to an interlocutory decree, subject to revision pending review by the Court of said accounting, declaring that:

a. The plaintiffs and the class they represent are the beneficial owners of the 37½% royalty fund as determined in Sakezzie, et al. vs. The Utah State Indian Affairs Commission, et al., and

b. The 1968 Amendment to Public Law No. 90-306 (82 Stat. 121) is unconstitutional and in contravention of Amendment V of the United

States Constitution insofar as the 1968 Amendment changes the class created by the 1933 Act and/or the purposes for which said royalty fund can be expended.

12. The Court retains jurisdiction and will consider any additional evidence and make such further orders as may be necessary.

13. Following said accounting and proceedings, the Court will enter a final judgment and decree in accordance with these Findings of Fact and Conclusions of Law and in accordance with any additional Findings of Fact and Conclusions of Law which the Court may determine to be equitable and proper.

Signed this 17 day of Feb., 1972.

/s/ Willis W. Ritter
Chief Judge
United States District Court
for the District of Utah,
Central Division

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. C-21-70

[Filed in United States District Court, District of Utah. Time: Mar. 20, 1972. /s/ Andrew John Brennan, Clerk.]

JAMES JIM, TOM BELETSO, SETH BIGMAN, and DAVID KING, PLAINTIFFS

vs.

STATE OF UTAH, UTAH BOARD OF INDIAN AFFAIRS, JOHN BOYDEN, LYMAN TYLER, DON E. SMITH, TINA WILLIE, HOMEY SECAKUKU, FRANK L. TIMBIMBOO and MCKAY PICKYVIT, DEFENDANTS,

UNITED STATES OF AMERICA, INTERVENOR

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, Intervenor, hereby appeals to the Supreme Court of the United States of America from the Interlocutory Decree and Order entered in this action the 17th day of February, 1972.

This appeal is taken pursuant to 28 U.S.C. Sec. 1252.

DATED this 20th day of March, 1972.

/s/ C. Nelson Day
C. NELSON DAY
United States Attorney
Attorney for United States
of America, Intervenor

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1509

STATE OF UTAH, et al.,
Appellants,
vs.
JAMES JIM, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1509

STATE OF UTAH, et al., *Appellants,* vs. JAMES JIM, et al., *Appellees.*	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Navajo Tribe of Indians hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Solicitor General and of the attorney for appellants has been obtained. The consent of the attorney for appellees was requested but refused.

The beneficiaries of the 1933 Act of Congress and the 1968 Amendment here in question are members of the Navajo Tribe. The judgment of the District Court, holding the 1968 Amendment unconstitutional, would restrict use of the 37½% royalty fund to about 10% of the Navajo Indians residing in San Juan County Utah. The remaining 90% of the Navajo Indians residing on or adjacent to the Reservation in San Juan County would be

deprived of desperately needed educational and economic benefits accruing from the multi-million dollar royalty fund in question. The Navajo Tribe exercises general governmental powers over the Utah Reservation, including the obligation to provide for the general welfare of Tribal members. The decision of the District Court, which balkanizes the Utah Reservation into a few rich geographic islands to the detriment of the remaining 90% of the Navajo Indians in San Juan County, will seriously affect the ability of the Navajo Tribe to fullfill its governmental responsibilities to all Utah Navajos.

In the District Court all parties argued the constitutionality of the 1968 Amendment largely on the assumption that such Amendment in fact effected a change in the class of Indian beneficiaries created by the 1933 Act. It is the position of *amicus curiae*, set forth in the attached brief, that the 1968 Amendment effected no such change and accordingly that the constitutional questions posed by the parties need not be reached.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1509

STATE OF UTAH, et al., *Appellants,* vs. JAMES JIM, et al., *Appellees.*	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE, IN THE SUPPORT OF JURISDICTIONAL STATEMENT

The portion of the Navajo Indian Reservation located within the State of Utah was created between 1884 and 1958 by two Acts of Congress and two Executive Orders.[1] This lawsuit has its origins in 47 Stat. 1418 (hereinafter referred to as "the 1933 Act") which added two areas (hereinafter referred to as "the Aneth Extension") to the Utah Reservation. The 1933 Act provided that 37½% of any oil royalties derived from the lands added to the Reservation would be aministered by Utah for the benefit of the Navajos, providing in pertinent part:

[1]Exec. Order of May 17, 1884; Exec. Order No. 324A (March 10, 1905); 47 Stat. 1418 (1933); 72 Stat. 1686 (1958).

"Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein."

In 1968, Congress amended the foregoing provision of the 1933 Act in part by deleting the language following the word "Utah" and adding new language, the pertinent part of which provides that such royalties shall be expended by Utah "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." 82 Stat. 121 (hereinafter referred to as "the 1968 Amendment"). The question presented is whether the 1968 Amdenment constitutes an unconstitutional taking of rights previously vested in a different class of beneficiaries by the 1933 Act.

Neither the language nor the legislative history of the 1933 Act support the judgment of the District Court that rights were thereby exclusively vested in residents of the Aneh Exension as a class.[2] The dispositive language of that Act relating to beneficiaries consists of three disjunctive clauses, each separated by the word "or". The first clause, providing for expenditures by Utah "in the tuition of Indian children in white schools . . .", contains no geographical restriction whatever. Thus, on its face, the 1933 Act can be read to describe a class of beneficiaries consisting of the

[2]The District Court's opinion [Finding of Fact No. 16] suggests that the class of beneficiaries intended by the 1933 Act was previously determined in *Sakezzie v. Utah State Indian Affairs Commission*, 198 F.Supp. 218 (1961), 215 F.Supp. 12 (1963). However, that case did not involve any factual question as to the class of beneficiaries falling within the "tuition of Indian Children clause . . .", and the Court's holding on the facts presented was reached by reference to other clauses of the 1933 Act. Hence determination of the question here presented is not precluded by doctrines of collateral estoppel. *Restatement of Judgments* §68 (1942 Ed.), 1948 Supp. 336-7 (1949).

entire Navajo Tribe (or at least all children in the Navajo Tribe). That reading is supported by the fact that the Act grants the lands described therein to the Navajo Tribe (rather than any subgroup thereof) and makes reference to "37½ per centum of the net royalties accruing therefrom derived from *tribal* leases . . ." [emphasis supplied].

On the other hand, the central feature of the entire 37½ percent provision was designation of the State of Utah as trustee, and that fact militates in favor of Congressional intent to limit the class of beneficiaries to those Navajos residing within the jurisdiction of Utah. Thus, while the language of the 1933 Act may not define the intended class of beneficiaries with perfect clarity, it quite clearly does not restrict the beneficiaries to residents of the Aneth Extension.

The legislative history of the 1933 Act likewise suggests that the intended beneficiaries were to be most or all of the Navajos residing in Utah. Both the House Report [H.R. Rep. No. 1883, 72d. Cong., 2d Sess. (1933)] and the Senate Report [S. Rep. No. 1199, 72d. Cong., 2d. Sess. (1933)] preceding the 1933 Act contain a memorandum from the Commissioner of Indian Affairs disclosing that the Commissioner had obtained the support of Utah citizens for the legislation on the basis of the understanding set forth in a "Memorandum of Agreement" which is printed in the Reports. Paragraph 4 of the Memorandum of Agreement provides that "The 37½ royalty clause in the above bill [H.R. 11735] is to remain, but the State of Utah is free to change to the usual form." While apparently no such change "to the usual form" was in fact made,[3] such language does suggest that all parties understood that the rather inelegant phraseology of the Bill should be understood by reference to the "usual form" of such clauses.

---

[3]The royalty clause language in the Bill as originally introduced in the first session of the Seventy-second Congress is identical to the language as passed in the second session.

The 37½ percent clause had its genesis in the General Leasing Act of 1920 which opened the public domain to oil leasing with the proviso that the states would receive 37½ percent of the royalties "to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct . . ." 30 U.S.C. § 191 (1920). *See* L. C. Kelly, *The Navajo Indians and Federal Indian Policy* (1968) at 37-101. This legislative antecedent, authorizing broad categorical expenditures without limiting beneficiaries to persons actually residing on the leased lands, suggests that the intent of the 1933 Act was to give Utah broad authority to make expenditures for all Navajo Indians in Utah. Whatever the precise limits intended, neither the language nor the history of the 1933 Act support appellees' contention that exclusive rights to the royalty monies were vested in the residents of the Aneth Extension.

The 1968 Amendment resolved the ambiguities inherent in the language of the 1933 Act by precisely defining the class of beneficiaries as "Navajo Indians residing in San Juan County." Whether such a class definition is precisely that originally intended by the 1933 Act is impossible to ascertain, but certainly Congress was the appropriate body to make a judgment as to how best to clarify the 1933 Act. And indeed the best reading of the 1933 Act is that the intended beneficiaries consist of a class of Navajo Indians residing in Utah, but not limited to residents of the Aneth Extension. Since the Navajo Reservation in Utah is located wholly within San Juan County, and since the few Navajo Indians residing off-Reservation also reside in San Juan County, it appears that Congress has elected to clarify the 1933 Act by defining the beneficiaries as all Navajos residing on or near the Reservation. Surely that is a reasonable reading of the intent of the 1933 Act; it could be exactly what Congress intended in 1933. In any event, Congress is the appropriate body to make such a judgment. *Chippewa Indians of Minnesota v. United States* 301 U.S. 358, 376 (1937) (Reconciling appar-

ent inconsistencies in a Congressional enactment relating to disposition of Chippewa lands, stating: "[A]n act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril.") *United States v. Thirty-Seven Photographs*, 402 U.S. 363, *reh. denied* 403 U.S. 924 (1971).

Conclusion

For the foregoing reasons, the 1968 Amendment does not materially change the class of beneficiaries included in the 1933 Act, and accordingly the judgment of the District Court holding such Amendment to be unconstitutional should be reversed.

Respectfully submitted,

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OCT 4 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1539

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES JIM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1509

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES JIM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM DECREE AND BRIEF IN SUPPORT THEREOF

Pursuant to Rule 16 of the Rules of this Court, Appellees move to affirm the decree of the District Court upon the ground that it is manifest that the questions on which the decision of this case depend are so unsubstantial as to need no further argument and have previously been decided by this Court adversely to the contentions of Appellants.

INTRODUCTION

Appellant United States has fairly and accurately set forth in its jurisdictional statement the Opinion Below, Jurisdiction, Statutes Involved and Question Presented.

The additional Questions Presented by Appellant State of Utah are specious. It matters not that the United States and the Navajo Tribe have not consented to be sued. The relief sough by Appellees in this action required no action and imposed no restraint upon either the United States or the Navajo Tribe; they had no proprietary interest in the 37½% royalty fund which is the subject matter of this action. In addition, the United States has intervened herein pursuant to 28 U.S.C. § 2403. In its intervention the United States did not assert any interest in the royalties or the Aneth Extension lands.

The State of Utah can have no immunity from this action because this action has no impact on the governmental actions of the State of Utah—the royalty funds are not State revenues and are not disbursed to fulfill State governmental obligations. In addition, the State of Utah has by the enactment of Section 6, Chapter 139, Laws of Utah 1965, waived its immunity from suit:

> Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

This action meets the class action requirements of Fed. R. Civ. P. 23(a) and 23(b)(2). Appellees have maintained this action as representatives of the Indians

who reside on the Aneth Extension and it is that class as a class (and not as individual members thereof) which has the statutory and adjudicated right to receive the benefits from the royalties which are the subject matter of this action.

STATEMENT OF THE CASE

Appellees are representatives of a class of Indians with membership of approximately 1,500 people. They are mostly Navajos with a small mixture of Piute blood, *Sakezzie v. Utah Indian Affairs Commission*, 198 F. Supp. 218 at page 220 (Utah 1961) (hereinafter referred to as the "first *Sakezzie* case"). Appellees and the class represented by them and their ancestors have lived for generations in the areas commonly known as Ol Jato, Montezuma Creek and Navajo Mountain which were separate and apart from the Navajo Indian Reservation until annexation by statute in 1933 as the Aneth Extension, 47 Stat. 1418 (hereinafter referred to as the "1933 Act"). (See also Findings of Fact No. 11 and 12 of the court below in Appendix B pp. 19-21, Jurisdictional Statement of the United States.)

These Indians have continued to live in their primitive hogans, graze their small flocks of sheep and goats and farm their semi-arid lands in this remote and relatively naccessible area, respecting each other's area and the rea of the advancing white man (Finding of Fact No. 2). Their language and culture have, for the most part, emained primitive Navajo.

The 1933 Act itself shows the manifest intention of ie drafters of the legislation. It provides:

> [The lands of the Aneth Extension] are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary may see fit to settle thereon.

To make certain that the area inhabited by these Indians was permanently confined, the Act further provided:

> No further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said County.

After thus treating the matter with words indicating clear finality, the Act dealt with the question of oil and gas, which had not been discovered at that time. It provided:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ percentum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah. Provided, that said . . . royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described . . . .or for the benefit of the Indians residing therein.

The white man was content to let these Indians live in this desolate semi-arid area where no one else wanted

to live. No problem arose with respect to the 1933 Act until years later when oil and gas were discovered in commercial quantities on the Aneth Extension (Finding of Fact No. 13).

The State of Utah thereupon undertook its duty to handle the trust funds thus accruing by creating the Utah Indian Affairs Commission and charging it with the administration and disbursement of these funds. Later, by further enactment, the Utah legislature abolished that Commission and created a successor Board, identified as the Utah Board of Indian Affairs, which, at all times material to this action, was charged with the responsibilities created by the 1933 Act (Finding of Fact No. 14).

As these funds accumulated into a sizeable amount (the accumulated and unused portion of the 37½% royalty fund as of June 30, 1970 was $7,039,022.32), questions arose as to how it should be spent. These Indians who were "benefited" by the 1933 Act, found themselves provided with a new paved road and, among other "benefits", a new airport. They wanted neither; however, both did provide excellent access for the white man—oil men, tourists and pilots, *Sakezzie, supra.*

In 1961, these Indians filed an action in the United States District Court for Utah, Central Division, to prevent the State of Utah as trustee from making further expenditures of funds from the trust unless such expenditures were for the benefit of the class of Indians residing on the Aneth Extension, *Sakezzie, supra.*

In his first opinion in that case, Judge Christensen, after noting the expenditures which had been made and which were about to be made, said:

That the duty of the defendants both under Federal and State law, between which there is no conflict in this respect, is to receive, administer and expend the said 37½ per cent fund for the benefit of the Navajo Indians residing on said Aneth Extension and such other Indians resident thereon at the time as the Secretary of the Interior has seen fit to settle thereon, all of whom are equitable beneficiaries of said fund. That said fund is not a public fund, and that it may not be used for State, Federal or public purposes or to discharge general governmental duties to the plaintiffs and those represented by them, who are citizens of the State of Utah and the United States of America and entitled to the rights and privileges of such citizenship. 198 F. Supp. 218, 224.

And again:

. . . . It is necessary to bear in mind that the tribe as a whole is not the designated beneficiary of this fund and that its interests and views may in some respects be in conflict with the more pertinent interests and views of the beneficiaries. The Tribe also has responsibilities to its members, including the beneficiaries of said fund, but said fund is not intended, and may not be used, for general tribal purposes. That the proper administration of said fund requires an effective canvas, expression and consideration, of the views of the beneficiaries. 198 F. Supp. 218, 225.

The judgment had little effect. The Commission failed to adequately comply with the decision and the field representative of the Commission to the Aneth Extension stated that he "didn't pay any attention to a small court", *Sakezzie v. Utah State Indian Affairs Commission,* 215 F. Supp. 12 at pp. 13 and 23 (Utah 1963) (hereinafter referred to as the "second *Sakezzie* case"). It was, therefore, necessary for the Indians to return to court to seek supplemental relief. Judge Christensen again held in favor of the Indians. In the second *Sakezzie* case he stated:

> The evidence now shows without dispute that the Commission from shortly after the entry of the declaratory judgment actively has sponsored legislation to extend the benefits of the fund to other Indians, and that pending final action on this legislation it has assumed to suspend any judgment or activity with regard to an affirmative program for the benefit of the Indians and declined to consider expenditures that might otherwise appear to them for the benefit of the Indians. The court concludes that the defendants are failing in accordance with the judgment to consider in good faith expenditures for the benefit of the Indians residing in the Extension. 215 F. Supp. 12, 20.
>
> . . . . However, I do not believe that the defendants as trustees or as administrators of that fund have the right, contrary to the declaratory judgment, to suspend or abandon their duties pending the possibility of enacting legislation which might reduce the interest of the plaintiffs

as beneficiaries of the fund even apart from constitutional questions that might be involved. 215 F. Supp. 12, 21.

No appeal was taken from either of the two *Sakezzie* decisions and they have long since become the law of the case.

Despite its duty as trustee to the Indians the State of Utah chose to disregard the decisions of the court and succeeded in obtaining an amendment to the 1933 Act by the enactment of Public Law 90-306 (82 Stat. 121) (hereinafter referred to as the "1968 Amendment"). (See the second *Sakezzie* case at p. 21, footnote 14 and p. 23 and minutes of the Board of Indian Affairs for June 28, 1965 and February 16, 1968).

The 1968 Amendment enlarged the class of beneficiaries from the approximately 1,500 Indians residing on the Aneth Extension to include within the class of beneficiaries all of the Navajo Indians residing in San Juan County, Utah, numbering approximately 15,000. It eliminated Indians other than Navajos who were residing on the Aneth Extension (e.g., Piutes) from any benefits. Appellants concede that the 1968 Amendment deprives the Appellees of substantially all of the 37½% royalty without compensation.

The instant action was commenced by the same class of Indians who were plaintiffs in the two *Sakezzie* cases to test the constitutionality of the 1968 Amendment. The Honorable Willis W. Ritter heard evidence in the case, part of which was taken at the Ol Jato Chapter House on the Ol Jato area of the Aneth Extension so that mem-

bers of this class of Indians, some of whom were old and unable to travel to Salt Lake City, could testify. On February 17, 1972, Judge Ritter signed Findings of Fact and Conclusions of Law and an Interlocutory Decree and Order in which he held that the 1968 Amendment to the 1933 Act which enlarged the class from the 1,500 Indians residing on the Aneth Extension to the 15,000 Navajo Indians residing in San Juan County, Utah "deprives the plaintiffs of their title and ownership of said 37½% royalties, in violation of Amendment V to the Constitution of the United States and is unconstitutional and invalid insofar as it dilutes the plaintiffs' title and ownership and changes the purposes for which such royalty funds may be expended." (See Interlocutory Decree and Order No. 3 in Appendix A pp. 15-16, Jurisdictional Statement of the United States.)

ARGUMENT

I. THE 37½% ROYALTY FUND IS VESTED IN APPELLEES.

Underlying the only real issue in this action is the proposition, urged by the United States and the State of Utah (in its capacity as trustee for Appellees), that Indians in the United States are not entitled to fifth amendment protection from governmental action. The answer to that proposition, on which the decision in this action depends, should be so manifest to the court that it is unsubstantial and does not need further argument.

Appellees' position is that the class of Indians residing on the Aneth Extension is the vested beneficial owner of 37½% of the royalties derived from the oil and

gas leases on the Aneth Extension. The title to and ownership of such royalties is a community title and is not vested in Indians as individuals.

The vesting of such beneficial ownership has been confirmed by aboriginal possession, congressional statute and judicial decision. The aboriginal title of Appellees and the class represented by them resulting from the historical occupancy of the Aneth Extension by them and their ancestors has been repeatedly recognized by this Court as a title "considered as sacred as the fee simple title of the whites," *Mitchel v. United States,* 9 Pet. 746.

The 1933 Act irrevocably vested the right to beneficial ownership in the 37½% royalty fund in the class of Indians residing on the Aneth Extension by defining the Aneth Extension and prohibiting further forms of entry or disposal of it. The Act also prohibited Indians from receiving further allotments or homesteading in San Juan County, Utah. The *Sakezzie* decisions confirmed that the 37½% royalty funds was a trust fund of which Appellees and the class represented by them were the equitable beneficiaries and that the fund must be expended for the exclusive benefit of the Indians residing on the Extension and that it could not be used to discharge governmental or tribal obligations to the beneficiaries.

II. APPELLEES CANNOT BE DEPRIVED OF THEIR PROPERTY WITHOUT JUST COMPENSATION.

This Court has held that even Indians cannot be deprived of their property without just compensation.

United States v. Creek Nation, 295 U.S. 103. This was an action in the Court of Claims by the Creek Tribe against the United States to recover compensation for a tract of land of approximately 5,575 acres in Oklahoma. By an act of Congress, jurisdiction was conferred upon the Court of Claims to hear, examine, adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek tribe. Under the treaty of 1833, the United States granted a patent to the tract to the Creek tribe in exchange for other lands.

In 1874, the United States entered into a treaty with the Sac and Fox tribe by which it assigned to this tribe a tract adjoining the Creek tract. Due to errors in the government's survey, the conveyance of the Sac and Fox tract included the Creek tract. By agreement between the Sac and Fox tribe and the United States, which was ratified by an act of Congress, the 5,575 acre tract belonging to the Creeks was in part allotted to Sac and Fox Indians and part was sold to settlers. The proceeds of sale were deposited as public funds in the treasury of the United States. The government contended that the action was a simple action for damages caused by errors of administrative officers and that the Court of Claims, therefore, had no jurisdiction. This contention required the Court to determine whether the act of Congress allotting the Creek lands to the Sac and Fox Indians and selling other parts of the tract to settlers was within the power of Congress. This Court held that it was not.

> . . . The tribe was a dependent Indian community under the guardianship of the United

> States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113, 39 S.Ct. 185, 186, 63 L.Ed. 504, 506; *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307, 308, 23 S.Ct. 115, 47 L.Ed. 183 (295 U.S. 103, 109-110).

The pertinent constitutional restrictions referred to in the quotation above are unmistakably contained in the fifth amendment.

Lane v. Pueblo of Santa Rosa cited in the *Creek Nation* case also denied the power of the United States to control Indian lands for purposes other than protecting the property from dissipation or loss. The plaintiff in the action was a town or pueblo inhabited by a group of Indians. It was the ancestral home of the Indians who had occupied it for farming and stock raising for several generations. Plaintiff claimed title to the land under a Spanish grant and also by occupancy which had never been disturbed. The Secretary of the Interior, acting under

the acts of Congress authorizing the sale of public lands, advertised the property for sale and was proceeding to sell it at public auction. The Court held that the Indian title was valid and that the act of the United States in selling the land as part of the public domain would be an act of confiscation.

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States — recognized as such by the legislative and executive departments — and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly, it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. 249 U.S. 110, 113.

In *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, the Shoshone Tribe of Indians under a treaty ratified by an act of Congress relinquished their claim to over forty-four million acres of land in four western states and accepted in exchange a reservation of three million acres in Wyoming known as the Wind River Reservation. The United States agreed that the Wind River Reserva-

tion would be set apart for the absolute use and occupation of the Shoshone Indians and such other friendly tribes as the Shoshones would consent to. Without obtaining this consent, a band of Arapahoes was installed on the reservation under military escort. By act of Congress an agreement was approved whereby part of the reservation was ceded to the United States for a money consideration which was to be distributed among the Shoshone and the Arapahoes equally. The Shoshones claimed all of the proceeds of the cession, but the government refused to recognize it. It made subsequent arrangements whereby it recognized and protected the claimed right of the Arapahoes. The Shoshones claimed that the government had by statute appropriated a one-half interest in the reservation and awarded it to the Arapahoes in violation of the fifth amendment. This Court affirmed that claim. Speaking of the power of the government to manage and control the property of Indians, the Court said that:

> The power does not extend so far as to enable the Government "to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . for that would not be an exercise of guardianship but an act of confiscation." 249 U.S. 476, 497.

III. THE LOWER COURT WAS NOT BIASED OR PREJUDICED.

As to the charge by the State of Utah that the court below was manifestly biased and prejudiced in favor of Appellees, we urge the Court to read fully the record and

transcript below and, in particular, to examine the two *Sakezzie* decisions. By acting as statutory trustee for the class of Indians residing on the Aneth Extension while at the same time taking affirmative action to deprive the class of the trust funds, the State of Utah has breached its fiduciary duty and the court below, or any court, is justified in being critical. As Judge Christensen stated in the second *Sakezzie* case:

> If there were ever a humanitarian dream come true, if there were ever an opportunity for proof in this country that when Indians have been treated shabbily by government it is because of practical limitations rather than mere niggardliness, the situation of [the State of Utah] would seem to present them. Yet by rather clear proof . . . it is shown that . . . [it] has . . . [had] insufficient regard for the interests of the plaintiffs and those whom they represent as Distinguished from others. Among other things, it has declined to exercise its judgment under the laws governing its functions; it has suspended the consideration of projects which could be most beneficial to those designated by the present federal and state laws, pending an effort on its part to effect a dilution of plaintiffs' rights. The [State of Utah] has permitted itself to be influenced in this respect by interests out of harmony with its own duty. . . 215 F. Supp. 12, 22-23.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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DEC 14 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

Nos. 71-1509; 71-1612

UNITED STATES OF AMERICA,
Appellant

vs.

JAMES JIM, ET AL.,
Appellees

and

STATE OF UTAH, ET AL.,
Appellants

vs.

JAMES JIM, ET AL.,
Appellees

FOR REHEARING

PETITION ~~TO VACATE PER CURIAM DECISION AND TO GRANT APPELLEES A HEARING AND BRIEF IN SUPPORT THEREOF~~

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PETITION TO VACATE PER CURIAM DECISION AND TO GRANT APPELLEES A HEARING AND BRIEF IN SUPPORT THEREOF

PETITION TO VACATE PER CURIAM DECISION AND TO GRANT APPELLEES A HEARING

Appellees petition the Court to vacate the Per Curiam decision reversing the judgment appealed from and to set the case down for oral argument and hearing. The petition is based upon the grounds that:

1. The decision denies the Appellees procedural due process in that it summarily disposed of the action without giving Appellees any opportunity to be heard or even to present full briefs on the matter, and without any consideration of Appellees' case and the prior relevant decisions of the Court.

2. The Court has not adjudicated all the substantial issues of the case.

3. The Court's determination that Appellees' interest in 37½% of the royalties from oil and gas leases on the Aneth Extension, 47 Stat. 1418 (the "1933 Act"), is not protected by the Constitution is in error because:

(a) it ignores the relevant provisions of the 1933 Act.

(b) it ignores the unchallenged findings of the lower court;

(c) it is in conflict with prior decisions of the Court.

ARGUMENT

I. THE PER CURIAM DECISION DEPRIVES THE APPELLEES OF PROCEDURAL DUE PROCESS

In response to the written request of the Court, the Appellees filed a motion to affirm the judgment. No alternative motion to dismiss was filed because it was clear that the Court had jurisdiction of the appeals and that Appellants had complied with the rules of the Court and conformed to the statute relating to appeals.

Without hearing any oral argument and without giving Appellees any opportunity to present a brief other than in support of its motion to affirm, the Court has summarily reversed the judgment in a manner which appears to be contrary to the stated policy of the Court in deciding matters without oral hearing (see Rule 45). Because of their minority and primitive status, Appellees' claim should be given full and complete consideration.

We submit that the case presents very serious problems with respect to the property rights of communities of primitive Indians who deserve more than a summary reversal of their cause. The procedure followed by the Court in a case of this kind is unprecedented so far as we can determine. The right to be heard is a fundamental right and should not be denied, particularly where the parties involved are primitive Indians who are without the knowledge, resources or political power to have their rights and needs known through the legislative process.

II. THE COURT HAS NOT ADJUDICATED ALL SUBSTANTIAL ISSUES IN THE CASE

The only motion before the Court was a motion to affirm the judgment of the lower court. Had the motion

been granted, no further issues would be before this Court. But by a premature reversal on the merits, a serious issue remains which the Court has not had an opportunity to consider; that is, whether the funds accrued from the 37½% royalty fund at the time of the enactment of the 1968 Amendment can be expended only for the benefit of Appellees.

At the time of this Court's decision, counsel for all parties had agreed upon and were in the process of preparing an "Abstract of Minutes and Financial Statements of Defendant Utah Board of Indian Affairs" which indicated that as of June 30, 1968 the amount of the 37½% royalty fund accrued but unexpended and uncommitted was approximately $5,760,000.00. The 1968 Amendment became effective on May 17, 1968.

This question was not adjudicated by the lower court because counsel for Appellants had not, at the time of reversal by this Court, filed an accounting ordered by the lower court. Appellees respectfully request an opportunity to present the question of whether the money from the 37½% royalty fund accrued at the time of the 1968 Amendment can be expended only for the benefit of Appellees by oral argument and written brief to the Court.

III. THE COURT'S DECISION IGNORES RELEVANT PROVISIONS OF THE 1933 ACT

The per curiam opinion stating that the 1933 Act did not create constitutionally protected property rights in the Appellees rests upon the conclusion that the Act vested the title to the Aneth Extension lands and all

royalties resulting therefrom in the Navajo Indian Tribe for the benefit of the members of that Tribe. This interpretation of the Act is unwarranted and is contrary to its plain terms.

The Navajo Indian Tribe is not mentioned in the 1933 Act as the beneficiary of the 37½% royalty fund. The withdrawal of the lands within the Aneth Extension was "for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Secretary has not settled any Indians on the Extension, and the grantees under the Act are the Indians thereon—the Appellees herein. There are many members of the Navajo tribe who live off the reservation in San Juan County, Utah and also many who live on the part of the reservation in the State of Arizona. Manifestly, the withdrawal of the Aneth Extension lands was not intended by Congress to be for their benefit. The Appellees were the Indians "thereon" when the Act was passed and they are the only grantees designated in the Act. There are approximately 85,000 members of the Navajo Tribe; approximately 1,500 of whom live on the Aneth Extension and approximately 13,500 of whom reside in San Juan County, Utah on lands not on the Aneth Extension or the Navajo Reservation.

The Court's decision is inherently contradictory. While it holds that the title to the royalties is not in those who reside on the Aneth Extension (Appellees herein) but in the Navajo Tribe, the Court also holds that the class entitled to 37½% of the royalties is not the Navajo Tribe nor the class named in the Act creating the Aneth Extension, but an arbitrary class: all Navajo Indians residing in San Juan County, Utah; a class, 90% of

which does not reside on any part of the Aneth Extension or the Navajo Indian Reservation; a class which is significantly larger than the class of Indians residing on the Aneth Extension which produces the oil and gas from which the royalties come; a class which is significantly smaller than the Navajo Tribe. The definition of the class given the benefits of the 37½% royalty fund does not meet the Court's own criteria of "common use and equal benefit of all the members." The only characteristic of the class is that it encompasses those Navajo Indians who reside within a political subdivision created by the white man—a county in the State of Utah.

There is no rationale for an equitable distribution of the royalties except on the basis of territory. Under the 1968 Amendment all of the royalties could be used, within the terms of the statute, for the benefit of white men and Indians who have no connection with the land which produces the royalties.

IV. THE COURT'S DECISION IGNORES THE UNCHALLENGED FINDINGS OF THE LOWER COURT

The Court relied on a report of the Senate Committee on Interior and Insular Affairs, S. Rep. No. 710, 90th Cong., 1st Sess. 2 (1967) that the 1933 Act created problems of interpretation and difficulty in defining the class. That report concerned legislation proposed by the Appellants herein who are statutory trustees for Appellees. It was prepared without the opportunity of Appellees to properly present their views to the Congress.

Any legitimate interpretation problems of the 1933 Act were resolved before 1967 by Judge Christensen in

Sakezzie v. Utah Indian Affairs Commission, 198 F. Supp. 218 (Utah 1961). Supplemental proceedings were brought, 215 F.Supp. 12 (1963), not because of further problems of interpretation but because the statutory trustees of Appellees who are defendants herein *ignored* the court. Those decrees were never appealed and became *res adjudicata*.

The lower court found directly contrary to the Senate report, to-wit:

> Plaintiffs and their ancestors for generations prior to the enactment of the 1933 Act and prior to the settlement of San Juan County by those they identify as "Anglo Americans" lived in the area known as the Aneth Extension as a definable group. During said time and until the present, they have farmed and grazed their livestock on said lands and have recognized and respected specific territorial boundaries between each other on the reserved lands and between themselves and "Anglo Americans" outside of said reservation.

The Court may rely on legislative history to interpret ambiguous legislation, but it should not use 1967 history to interpret a 1933 Act or to find facts contrary to those proved at the trial.

V. THE DECISION IS IN CONFLICT WITH PRIOR DECISIONS OF THE COURT

The Court relied upon *Gritts v. Fisher*, 224 U.S. 640, which is not controlling. In that case there was no question but that the lands were the property of the Cherokee Indian Tribe. By statute the land which was owned by the Cherokee Tribe as a community was distributed by allotment to the individual members thereof.

Congress then amended the statute to provide that the surplus tribal land, i.e., the tribal land remaining *after* each member had received his allotment, would be alloted to include those tribal members who were born after the time limitation imposed by the original act. It did not deprive individuals of their individual share of the land. The *Gritts* case does not support the action of the Court in the instant case because here the Court deprived the class of its present right to receive the benefits of the royalties by diluting their *present* interest in the funds by a ratio of ten to one and by permitting the fund to be used for the benefit of the white man as well as Indians.

Congress by statute may create or confirm a title in Indians (be it a tribe, band or community) as absolute as fee simple. What language could express clearer congressional intent that the 37½% royalty fund would be used for the benefit of Appellees than the language of the 1933 Act wherein it states that said funds shall be used ". . . for the benefit of the Indians residing thereon."

Appellees direct the Court to the cases decided by it more recently than the *Gritts* case, beginning with *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 which held that once an interest is given to or recognized in a group of Indians that interest cannot be diluted without just compensation. The principle was articulated in *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 684, 79 L.Ed. 1331:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to

> the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'

See also the significant line of cases following *Creek Nation.*

CONCLUSION

Appellees respectfully assert that the precedent relied on by the Court is not in point, that a substantial body of law supports the contentions of Appellees and that a resolution of the issues consistent with long recognized standards of due process compel a hearing and opportunity for full argument on the merits.

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CERTIFICATE

I hereby certify that I am counsel for the Appellees and Petitioners; that the above Petition is presented to the Court in good faith and not for delay.

JOSEPH S. JONES

UNITED STATES *v.* JIM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 71–1509. Decided November 20, 1972*

A statute enlarged the class of beneficiaries of certain royalties from oil and gas leases in the Aneth Extension of the Navajo Indian Reservation in Utah by providing that the funds be used to benefit all Navajo Indians residing in San Juan County rather than only those residing in the Aneth Extension, as provided in an earlier statute. *Held:* As the earlier statute did not create constitutionally protected property rights in the residents of the Aneth Extension, the statutory change did not constitute a taking of property without just compensation.

Reversed.

PER CURIAM.

The motion of the Navajo Tribe of Indians for leave to file a brief as *amicus curiae* in No. 71–1509, is granted.

These cases are here on appeal from a judgment of the District Court for the District of Utah that declared an Act of Congress to be unconstitutional. Jurisdiction in this Court is conferred by 28 U. S. C. §§ 1252 and 2101 (a).

In 1933, the Congress withdrew certain lands in Utah, known as the "Aneth Extension," from the public domain and added them to the Navajo Reservation. Though no oil or gas was believed to be located on these lands, it was provided that should such mineral resources be produced in commercial quantities, "37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided,* That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children

*Together with No. 71–1612, *Utah et al.* v. *Jim et al.*, on appeal from the same court.

in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein." 47 Stat. 1418. The remaining 62½% of the royalties generated by any such tribal mineral leases were, by implication, to go to the Navajo tribe.

After the passage of the Act, oil and gas were discovered on the Aneth Extension, and royalties were divided pursuant to the statute. The State of Utah created an Indian Affairs Commission to manage and expend the funds received by the State under the Act. As time went on, the language of the 1933 Act came to create administrative problems regarding the expenditure of the funds channeled through the State. A report of the Senate Committee on Interior and Insular Affairs noted in 1967 that the word "tuition" in the 1933 Act had created uncertainty as to the breadth of the educational program the State was authorized to finance from the royalty funds. The report also noted a difficulty in discerning precisely who was properly a beneficiary of the funds, since "many Navajo families do not live permanently within the lands set aside in 1933, but move back and forth between this area and other locations." S. Rep. No. 710, 90th Cong., 1st Sess., 2 (1967).

To make the administration of these funds more flexible and to spread the benefits of the royalties more broadly among the Navajo community, the Congress enacted a statute in 1968 that directed the State to expend the 37½% of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." 82 Stat. 121. This statutory change expanded the pool of beneficiaries substantially, and a class action was brought on behalf of the residents of the Aneth Extension, seeking *inter alia* a declaration that the statute was an unconstitutional taking of property without just compensation. The District Court concluded that the

1933 Act vested certain property rights in the plaintiffs, and held the 1968 Act, with its changed pool of beneficiaries, to be unconstitutional.[1]

The judgment of the District Court is in error. Congress in 1933 did not create constitutionally protected property rights in the appellees. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127, 136. To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation.[2] But it was well within the power of Congress to alter that distributional scheme.[3] In *Gritts* v. *Fisher*, 224 U. S. 640, this Court approved a congressional enlargement of the pool of Indians who were to benefit from a distribution of tribal property. There, too, an earlier statute had established a more limited entitlement.

> "But it is said that the act of 1902 contemplated that they [the beneficiaries under the first enactment] alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt

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[1] The decision of the District Court is unreported.

[2] While the 1933 Act remained in effect, the District Court properly insisted that the Utah State Indian Affairs Commission comply with the statutory formula for disbursements. See *Sakezzie* v. *Utah Indian Affairs Comm'n*, 198 F. Supp. 218 (declaratory judgment); 215 F. Supp. 12 (supplemental relief).

[3] We intimate no view as to the rights a *tribe* might have if Congress were to deprive *it* of the value of mineral royalties generated by tribal lands.

such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' . . . It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress . . . ." *Id.*, at 648.

Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the 37½% of royalties which flow through the State in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation. The judgment of the District Court is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

Plaintiffs below are a class of Indians with a membership of 1,500. They are a mixture of Navajo and Piute and live in an area of the Navajo Reservation called the Aneth Extension, made part of that reservation in a 1933 Act of Congress. 47 Stat. 1418. In 1968 Congress amended that Act, 82 Stat. 121, and the District Court for the District of Utah declared the amendment unconstitutional.

Prior to 1933 the Extension was part of the public lands of the United States. The area was occupied by the direct ancestors of the appellees.

The Indians in the Aneth Extension number about 1,500 people who are primitive Navajos with some mixture of Piute blood. See *Sakezzie* v. *Utah Indian Affairs Comm'n*, 198 F. Supp. 218, 220. They live in a remote and relatively inaccessible area with an average annual income per family of $240. *Ibid.* The Aneth Extension is in San Juan County and the 1933 Act stated: "[N]o further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county."

The white man was unconcerned about this domain until oil was discovered; and then he became quite active. By June 30, 1970, the royalties owing the Aneth Extension Indians had increased to $7,039,022.32. Of this, $78,000 was used to pipe water from the Aneth Extension to the adjoining lands of a white man, an "improvement" that only incidentally aided the resident Indians. Another $27,000 of Indian funds was spent for the construction of an airport and connecting road, which substantially benefited a white man's private dude ranch operation. Some $10,000 or more was expended for administrative purposes by Utah. 198 F. Supp., at 221. When this suit was started, additional expenditures were about to be made: $175,000 to a federal agency to locate isolated water springs on the Aneth Extension and $500,000 to build a hard-surfaced road outside the boundaries of the Extension.

These primitive Navajos wanted the money used to purchase high-elevation ranges where they might have summer grazing for the livestock and thus realize a round-the-year livestock operation. Judge Christensen found that members of the Aneth Extension were the sole beneficiaries of the fund and that it should be administered with their wishes in mind.

But there are tensions and conflicts between these primitive Navajos who live on the Aneth Extension and other members of the tribe who live elsewhere. 198 F. Supp., at 221.

The State Commission did not comply with the District Court's order but sponsored legislation to extend the benefits of the fund to other Indians.[1] Judge Christensen ruled again that the fund was solely for the benefit of members of the Aneth Extension. *Sakezzie* v. *Utah State Indian Affairs Comm'n*, 215 F. Supp. 12. Neither opinion was appealed. But the State Commission promoted legislation to extend the benefits of the 1933 Act to other Indians. *Id.*, at 20.

The problems the Commission had in administering the fund reached Congress and in 1968 the contested amendment was passed. 82 Stat. 121. This amendment indicates that money must be used by the State of Utah "for the health, education, and general welfare of the Navajo Indians residing in San Juan County" and that "Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, *as may be determined by the State of Utah* . . . ." *Ibid.* (Emphasis added.)

The 1933 Act gave title to the land and right to the fund, *not* to the *tribe* of the Navajo, but to the Aneth

[1] The Act admitting Utah to the Union provided:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 28 Stat. 108.

community.[2] I do not believe that under the circumstances of this case Congress had the power to expand the class of beneficiaries to include the whole tribe.

The occupants of the Extension have been a separate community for many generations. Their claim of right by continuous possession precedes the transfer of title by the United States Government. Congress made provision for the Secretary of the Interior to place other tribes on the land and, if he did, their claim would be based on territory, not membership. Since the rights were vested in those who lived on the Aneth Extension, I do not see how they can be extended to outsiders.

In *Gritts* v. *Fisher*, 224 U. S. 640, the Court upheld the power of Congress to expand the beneficiaries of certain Indian land to the children of those who already enjoyed those rights. Here the expansion is not limited to those of the same blood line. But, more important, Congress had a different legal relation to the Cherokees than it does to the appellees. "[T]he members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control

[2] That Act (47 Stat. 1418), after describing the Aneth Extension by metes and bounds, provided that those public lands "be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided*, That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U. S. C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein."

over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds . . . ." *Id.*, at 642. The 1933 Act states that the lands "are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." 47 Stat. 1418. That would seem to freeze the existing legal rights in that area of the Aneth Extension to the inhabitants. The legal effect seems like a disclaimer on the part of the United States of any right in either the land or the minerals. It is difficult for me to see how Congress has power to change the scheme without payment of just compensation. After all, Indians are beneficiaries of the Due Process Clause of the Fifth Amendment. *United States* v. *Creek Nation*, 295 U. S. 103; *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476. They too are people, not sheep or cattle that can be given or denied whatever their overseer decrees.

Indians are also beneficiaries of the Just Compensation Clause of the Fifth Amendment. *Chippewa Indians of Minnesota* v. *United States*, 305 U. S. 479; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317. When there is a taking of Indian lands, the compensation must take into account the mineral rights which are part of the lands. *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111. What then constitutes a taking? The majority finds no taking because ownership already existed in the Navajo tribe. The 1933 Act states, however, that all lands are "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon," 47 Stat. 1418. That Act plainly indicates that only those residing on that tract, not the tribe as a whole, were the beneficiaries.

If the royalty granted by the 1933 Act had been to the Standard Oil Co. or any other producer of oil, no one would dare say that the royalty could be assigned by a subsequent Congress to an oil consortium without payment of just compensation. Whenever we have made grants of public lands or interests therein to Indians the Court has held that the fact that Indians are wards and the United States a guardian does not make the Indian title defeasible. The Court in *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113, held that if the United States were allowed to take lands from Indians, "[t]hat would not be an exercise of guardianship, but an act of confiscation."

In *United States* v. *Creek Nation*, 295 U. S., at 109–110, the Court said:

> "The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them . . . ."

The present cases are close to *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, where Congress repeatedly put Arapahoes on Shoshone lands acquired under a treaty. This Court, speaking through Mr. Justice Cardozo, allowed damages to the Shoshones:

> "Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their

> title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. . . . What those incidents are, it is needless to consider now. . . . The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land *pro tanto*, in substance, if not in form." *Id.*, at 496.

And quoting from *United States* v. *Cook*, 19 Wall. 591, Mr. Justice Cardozo added,

> "The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.'" *Id.*, at 497.

What power remains in Congress after the express purpose of the Act "permanently [to] withdraw" the lands from disposal?

Public lands are usually subject to disposition by patent and upon its issuance, control over the transaction ceases and the patent can only be set aside by judicial proceedings in the courts. *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589; *Moore* v. *Robbins*, 96 U. S. 530. Thus, when Congress passed legislation giving public lands to the railroads, it was considered a contract which could not be broken by Congress when it sought to use the lands as a water-power site, *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228; nor could the Secretary reclaim the property. *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, 199. An entryman on a homestead claim does not achieve title until certain time and work conditions are met. 43 U. S. C. §§ 161–165. Yet, during this period he has the right to exclusive possession and use, unless the patent was secured by fraud. Patents

are not issued in oil and gas exploration but leases are. 30 U. S. C. § 226. But that fact does not affect the power to cancel the leases. That can only be done by a failure of the lessee to comply with the lease, the statute, and regulations. 30 U. S. C. § 188. *Pan American Petroleum Corp.* v. *Pierson*, 284 F. 2d 649.

Until lands are patented, title remains in the United States. Yet even before a patent issues the claims are "valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met." *Best* v. *Humboldt Mining Co.*, 371 U. S. 334, 336.

The devices for doing the Indians in, when it comes to royalties in gas or oil lands, are numerous. See *White* v. *Sinclair Prairie Oil Co.*, 139 F. 2d 103. But the owners of oil and gas interests (whether those interests be legal or equitable) normally have an interest separate and apart from the land where the oil and gas are discovered. See *Lane* v. *Hughes*, 228 S. W. 2d 986; 3 E. Kuntz, Oil and Gas, cc. 38 and 42 (1967); V. Kulp, Oil and Gas Rights § 10.36 *et seq.* (1954). It is strange law, indeed, when the guardian (the United States) is allowed to do in the wards (the Indians) by depriving them of their equitable interest in the oil royalties which had been granted or by reducing their share of the royalties granted.

The problems of this case are typical of those that have plagued the Indians from the beginning. We should put the cases down for oral argument to make certain that these primitive Navajos receive the full benefit of the law.